

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000423-MR

JOHNNY EUGENE FAIRCHILD

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND TAYLOR, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Johnny Eugene Fairchild appeals from the judgment of conviction against him for unlawful transactions with a minor in the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

first degree and second-degree sodomy. Upon review, we affirm the judgment and sentence of the Johnson Circuit Court.

Fairchild was indicted for a series of sex crimes involving the thirteen-year-old daughter of a girlfriend. Sometime before August 30, 2008, Fairchild and the girlfriend engaged in a sexual encounter at Fairchild's home. The girlfriend wanted Fairchild to leave his wife and be with her but Fairchild decided to stay married. On August 30, 2008, Fairchild began a series of text messages with one he thought was the girlfriend. Those messages contained explicit photos. In reality, the messages were from his girlfriend's thirteen-year-old daughter who was sending the messages and photos with the approval of her mother. The photos were of three individuals in various sexually explicit depictions.

Differing versions of events describe what happened next. All agree that Fairchild picked up the girlfriend and her thirteen-year-old daughter, and they went for a ride in his Jeep. They stopped on a hill by a radio tower. The thirteen year old testified that Fairchild removed her clothing and pulled her onto him attempting to engage in sexual intercourse. It was only when her mother said hunters were approaching that he stopped. The child also testified that on another occasion, Fairchild pulled her shorts aside and put his mouth on her vagina.

Fairchild was interviewed by a police detective and provided a statement. The detective assured him he was free to leave and that he was not going to be arrested. Fairchild now claims the detective tricked him and coached

him about what to say. Fairchild claims he agreed to go along with the detective's thoughts because he believed the detective could help him stop the girlfriend from bothering him.

The police statement disclosing Fairchild's version of the events of August 30, 2008, was that he was lying in the back of his Jeep when the girlfriend started performing oral sex on him. She then told her daughter to remove her clothing and straddle Fairchild as she rubbed his penis against the child's thighs. At one point he told the detective he thought this was a plan concocted by the mother and daughter. Fairchild stated he kissed the child on the mouth and on her breasts. Regarding another occasion, Fairchild told the detective the child unzipped his pants and tried to perform oral sex on him but he pulled away. He later testified that nothing actually happened that day because when he saw the child coming to his house, he went outside and waited for his wife to come home.

Fairchild's attorney entered an appearance as counsel on November 16, 2009. The case was set for trial on January 4, 2010. On December 3, Fairchild moved to continue the trial but that was denied on December 4, 2009. Fairchild then filed a motion to enter a guilty plea on December 18, 2009.

The trial court started its guilty plea hearing and Fairchild disclosed he suffered from multiple sclerosis but that it did not affect his ability to think or reason. During the plea colloquy, however, Fairchild indicated he had not had the opportunity to discuss the charges with his attorney. The trial court recessed and provided Fairchild the opportunity to discuss matters with his attorney. When the

plea hearing continued, the trial court explained to Fairchild the potential sentence from a plea of guilty. Fairchild asked if he still had the right to go to trial. When the trial court indicated that he could proceed to trial, Fairchild indicated that was the path he chose.

On December 23, 2009, counsel filed a motion to determine competency to stand trial arguing that Fairchild existed in a constantly irrational state of mind and exhibited extreme emotional swings. On December 29, 2009, the motion was supplemented stating that Fairchild had indicated to the court he suffered from multiple sclerosis. The court denied the motion noting it was not timely to raise notice of a mental disease or defect so close to trial.

Trial was held on January 4 and 5, 2010 before a jury that found Fairchild guilty of unlawful transaction with a minor in the first degree, sodomy in the second degree and sexual abuse. The trial court entered a judgment notwithstanding the verdict as it related to the sexual abuse charge merging it into the charge of unlawful transaction with a minor. Fairchild was then sentenced to serve ten years. This appeal followed.

Fairchild first argues the trial court erred when it failed to grant his motion for a directed verdict of acquittal on the charge of unlawful transaction with a minor. He additionally argues it was error for the trial court to instruct the jury on an alternative finding of guilt for that charge resulting in a verdict that was not unanimous. We disagree as to both arguments.

The jury was instructed that to find Fairchild guilty of unlawful transaction with a minor in the first degree, it had to find that he “knowingly induced, assisted, or caused” the child “to engage in Sexual Abuse in the First Degree, by kissing her and placing her breasts and/or nipples in his mouth” OR the child’s mother “knowingly induced, assisted or caused” the child “to engage in Sexual Abuse in the First Degree and the Defendant, Johnny Eugene Fairchild intentionally solicited, commanded, or engaged in a conspiracy with” the mother “for the purpose of inducing” the child “to engage in the illegal acts.” “A person is guilty of unlawful transaction with a minor in the first degree when he or she knowingly induces, assists, or causes a minor to engage in: (a) Illegal sexual activity.” Kentucky Revised Statutes (KRS) 530.064(1). Here, the Commonwealth alleged the illegal sexual activity was sexual abuse in the first degree. “A person is guilty of sexual abuse in the first degree when: . . . (c) Being twenty-one (21) years old or more, he or she: 1. Subjects another person who is less than sixteen (16) years old to sexual contact[.]” KRS 510.110(1). “‘Sexual contact’ means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]” KRS 510.010(7).

On a motion for a directed verdict, the trial court must view the evidence in a light most favorable to the Commonwealth. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Even from that view however, the law requires more than a mere “scintilla of evidence.” *Id.* “On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly

unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Mason v. Commonwealth*, 331 S.W.3d 610, 616 (Ky. 2011).

It is clear from the testimony of the child as well as the statement Fairchild gave the detective that a jury could reasonably believe there was sexual contact as defined by KRS 510.010. The jury also had sufficient evidence to find Fairchild was over the age of twenty-one and the child was under the age of sixteen when that sexual contact occurred in violation of KRS 510.110(1). For conviction, the jury then had to find sufficient evidence that Fairchild “knowingly induced, assisted, or caused” the child to engage in the illegal acts. Here, the evidence was sufficient to permit a jury to believe that Fairchild assisted the child. Had he immediately put a stop to the illegal acts when they began, his assistance would have been nonexistent. Rather, by the child’s testimony and his own statement, he allowed sexual contact to occur and continue, thereby assisting. It was not error to deny the motion for a directed verdict.

Additionally, Fairchild argues it was error for the trial court to provide the alternative finding that allowed his conviction if the mother actually induced the daughter’s acts. Fairchild argues in his reply brief that “the evidence is absolutely insufficient on the accomplice theory[.]” He also argues that the jury was allowed to reach a verdict that was not unanimous because some may have found guilt through the direct instruction, and some may have through the alternative accomplice instruction.

“It is not improper to include multiple alternative methods of committing an offense in a single jury instruction.” *Mason* at 618. Only “[w]hen a jury is presented with alternate theories of guilt and one or more of those theories are unsupported by the evidence, and the verdict does not reflect under which theory guilt was found, the defendant has been denied his right to a unanimous verdict.” *Purcell v. Commonwealth*, 149 S.W.3d 382, 393-94 (Ky. 2004). Here, both the direct violation and the accomplice alternative were supported by sufficient evidence, and there was no error in providing the alternative form of instruction.

Fairchild next argues it was error for the trial court to deny his motion for a competency hearing. We disagree.

KRS 504.100 states:

- (1) If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.
- (2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:
 - (a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and
 - (b) What type treatment and what type treatment facility the examiner recommends.
- (3) After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

“The standard of review in a case where the circuit court failed to hold a competency hearing is: “[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.”” *Jones v. Commonwealth*, 260 S.W.3d 355, 359 (Ky.App. 2008)(quoting *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999)). This Court further stated:

An incompetency hearing is only required when the trial judge is presented with sufficient evidence of reasonable doubt of competency to stand trial. If no reasonable grounds exist for doubting a defendant's competency, no error occurred in not holding a hearing. Reasonable grounds must be called to the attention of the trial court or must be so obvious that the trial judge cannot fail to be aware of them.

Id. (quoting *Lear v. Commonwealth*, 884 S.W.2d 657, 659 (Ky. 1994)). In *Bishop v. Caudill*, 118 S.W.3d 159, 162-63 (Ky. 2003), the Supreme Court of Kentucky stated:

[A] defendant is competent if he can “consult with his lawyer with a reasonable degree of rational understanding” and has “a rational as well as factual understanding of the proceedings against him.” The Court noted that a competent defendant can make a “reasoned choice” among the alternatives available to him when confronted with such crucial questions as whether he should testify, waive a jury trial, cross-examine witnesses, put on a defense, etc.

(Quoting *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993)).

At the hearing to enter a plea of guilty, Fairchild was directly examined by the trial court only days before the competency issue was raised. Fairchild acknowledged he could think and reason rationally. He exhibited those characteristics when he requested an opportunity to discuss the case with his attorney as well as his understanding of his right to proceed to trial. Fairchild failed to demonstrate sufficient evidence of grounds to question his competency to stand trial. We cannot conclude that the trial court erred by denying the motion for a competency hearing.

Next Fairchild argues he was denied his right to confrontation when the trial court utilized a video system for witness testimony that did not provide for actual face to face confrontation between Fairchild and his accusers.

Fairchild relies on the recent case of *Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010) where the Kentucky Supreme Court was presented with this exact issue. That case also arose in the Johnson Circuit Court and involved the same court room utilized for Fairchild's trial. The physical layout of that court room makes it difficult if not impossible for a person testifying to see a defendant sitting with his attorney at the defense table. In *Star* "[t]his became apparent during the testimony of both Geraldine Litton and Willie Sparks, who had to physically leave the witness stand in order to identify Appellant for the record." *Id.* at 39. Similarly, it is just as impossible for a defendant to directly view a witness. In this court room, a defendant is required to rely on the video monitor at the defense table to view any witness.

In all criminal prosecutions, the defendant has the right “to meet the witnesses face to face[.]” Ky. Const. § 11. In *Star*, the Kentucky Supreme Court held “that the physical layout of the courtroom produced a Confrontation Clause violation[.]” *Star* at 39. Even though counsel in *Star* raised an appropriate objection while Fairchild did not, we are bound by the Supreme Court’s determination that the physical layout of the court room creates a Confrontation Clause violation. Therefore we must conduct a harmless error analysis pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. The Commonwealth’s position that this issue was waived by a failure to object is of no consequence.

“A determination of prejudicial error by this Court would require some showing that Appellant's unobstructed observation would have affected the substance and credibility of the . . . witnesses.” *Sparkman v. Commonwealth*, 250 S.W.3d 667, 671 (Ky. 2008). Fortunately, the only witnesses in conflict with Fairchild were the child and the detective.

“[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person.” *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Id.* at 845, 110 S.Ct. 3157.

The testimony of the detective was in essence his rebuttal of Fairchild's claim that he had lied and deceived Fairchild during the interview. The tape of that interview was played for the jury and provided an accurate presentation of what the detective did or did not do. That rigorous testing of his testimony satisfies us that as it relates to the detective, the Confrontation Clause violation was indeed harmless.

As for the testimony of the child, she too provided a statement to the police. Her testimony was consistent with that statement taken over a year before trial. There is nothing to indicate she or anyone else had an inkling of an idea that she would not be required to confront Fairchild face to face. That consistency leads us to the conclusion that having to directly face Fairchild would not have affected her testimony in any manner.

Where it does not appear that the error had a substantial probability of changing the result, it is harmless. *See Capshaw v. Commonwealth*, 253 S.W.3d 557, 567 (Ky. 2008). Although it was error to allow the testimony with the layout of the court room as it is, there was no error in this case.

Finally, Fairchild suggests it was error when the trial court refused to grant his motion to suppress the statements he gave police. He argues that he was in custody because the detective was armed and that the detective made promises regarding incarceration that coerced Fairchild. We disagree.

Fairchild met with a detective in an unmarked police car sitting in his driveway. The detective secretly taped the entire conversation. Fairchild was told

he was free to go at any time, that he was not under arrest and would not be arrested and that he did not have to talk to the detective. Clearly he was not in custody and absent that, *Miranda* warnings were not required. Similar situations where the suspect is in the police station but remained free to leave hold *Miranda* warnings are not required. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

Fairchild relies on a case from the United States Court of Appeals for the Second Circuit for the proposition that when police lie and that lie aids in obtaining a confession, the evidence is fatally tainted absent *Miranda* warnings. That case, however, involved significant issues not present here and thus is distinguished from Fairchild's case. In that case, the defendant was arrested, held incommunicado and questioned extensively in addition to receiving false promises of assistance. *United States ex rel. Everett v. Murphy*, 329 F.2d 68m 70 (2nd Cir. 1964). "*Miranda* forbids coercion, not mere strategic deception[.]" *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990). It was not error for the detective to obtain Fairchild's statement in the manner he did, and suppression of that evidence was not required.

"[I]f supported by substantial evidence the factual findings of the trial court shall be conclusive." RCr 9.78. We discover nothing to lead us to believe the trial court erred when it failed to grant Fairchild's motion to suppress the statements.

There was no error requiring reversal, and we affirm the judgment and sentence of the Johnson Circuit Court.

ALL CONCUR.

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